IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SCOTT L. MERRINER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12021 Trial Court No. 2BA-13-251 MO MEMORANDUM OPINION No. 6366 — August 10, 2016

Appeal from the District Court, Second Judicial District, Barrow, Mary P. Treiber, Magistrate Judge.

Appearances: Charles M. Merriner, Law Office of Charles M. Merriner, Anchorage, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge ALLARD.

Following a nonjury trial, Scott L. Merriner was convicted of a strict liability fish and game regulatory violation (a "minor offense" under Alaska law) for taking a sub-legal Dall sheep ram.[1]

[1] *See* 5AAC 85.055(a)(10) (prescribing hunting seasons and bag limits for Dall sheep (continued...)

Merriner appeals his conviction to this Court, raising two claims. He argues first that his right to a speedy trial under Alaska Criminal Rule 45 was violated. Second, he argues that the fish and game regulation that required him to submit the horns of his sheep for sealing and inspection violated his constitutionally protected privilege against self-incrimination.

For the reasons explained here, we find no merit to either claim.

Underlying facts and prior proceedings

After taking a Dall sheep ram in the Brooks Range in August 2013, Scott Merriner brought the sheep's head and horns to the Department of Fish and Game for inspection and sealing, pursuant to the applicable fish and game regulation.[2] When the Department's biologists inspected and measured the horns, they determined that the horn curl was not a full 360 degrees, nor were the tips on both sides broken, and the sheep was therefore not legal.[3] Merriner disagreed and asserted that the sheep was legal.

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[1] (...continued)
ram); 5 AAC 92.002 (providing that "[u]nless otherwise provided ... a person who violates a provision of 5 AAC 84-92 is strictly liable for the offense"); Alaska Minor Offense Rule 2(f) (providing that "any fish and game offense in 5 AAC charged as a strict liability offense" is a "minor offense" under Alaska law).

[2] *See* 5 AAC 92.171(a) (providing that "[a] person may not alter, possess, transport, or export from the state, the horns of a Dall sheep ram taken in any hunt ... unless the horns have been permanently sealed by a department representative within 30 days after the taking").

[3] Under Alaska law, a Dall sheep ram is a legal size for hunting in certain areas of the state if it has full-curl horns (meaning that at least one horn has grown through 360 degrees of a circle), has horns with broken tips on both sides, or is at least eight years old, as determined by counting the annuli before taking the ram. *See* 5 AAC 85.055(a)(10); 5AAC 92.990(a)(30).

A trooper arrived and spoke with the Fish and Game biologists and with Merriner. Merriner told the trooper that he had taken the sheep and that he honestly believed the sheep was legal. The trooper photographed and seized the sheep head and horns. He then issued Merriner a citation for unlawfully "tak[ing] sub-legal Dall sheep."

In the original citation, the trooper checked the box for "misdemeanor." However, in the second citation (which was the first pleading filed in the court), the trooper checked *both* the "misdemeanor" box and the box for a "[Fish & Game] Offense charged as strict liability violation." The citation was therefore ambiguous as to whether Merriner was being charged with a strict liability violation of 5 Alaska Administrative Code 85.055(a)(10) — a minor offense under Alaska law for which Merriner would face a maximum fine of $500[4] — or, instead, a misdemeanor under AS 16.05.092.[5]

Because of this ambiguity, the court system originally treated Merriner's case as a misdemeanor and assigned it a criminal case number.

When Merriner's trial attorney filed his notice of appearance he alerted the court to the mistake. The attorney asserted that he had spoken to the prosecutor, who had agreed that the misdemeanor designation was a mistake and that Merriner was only being charged with a strict liability violation. He therefore requested that the case caption be amended and all references to a misdemeanor criminal charge be deleted from CourtView. Both requests were granted.

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[4] Alaska R. Minor Offense P. 2(f)(defining minor offense as including "any fish and game offense in 5 AAC charged as a strict liability offense"); AS 12.55.035(b)(7) (providing that the maximum fine for a "violation" is $500).

[5] AS 16.05.925(a) provides that a person who violates a regulation adopted under that chapter or AS 16.20 is guilty of a class A misdemeanor. The section of the administrative code under which Merriner was charged, 5 AAC 85.055, was promulgated pursuant in part to AS 16.05.255(a)(4), which permits the Board of Game to adopt regulations "setting quotas, bag limits, harvest levels, and sex, age, and size limitations on the taking of game."

Merriner was arraigned on the minor offense in November 2013. At the arraignment, the prosecutor again confirmed that Merriner was only being charged with the strict liability minor offense and that the misdemeanor designation was a mistake. Merriner entered a not guilty plea to the minor offense and requested a trial on the charge.

With the express agreement of both parties, the trial court set the trial for late January 2014. The parties subsequently filed a joint motion to continue the January trial date, which was granted. Trial was then re-set for February 2014.

The day before trial was to begin, Merriner filed a motion to dismiss alleging (1) that his speedy trial rights under Alaska Criminal Rule 45 had been violated; and (2) that his Fifth Amendment privilege against self-incrimination was violated by the fish and game sealing requirement. Merriner also filed a second motion to continue the trial.

Magistrate Judge Mary P. Treiber denied Merriner's motion to dismiss in a comprehensive written order. The judge concluded that Merriner had waived his Rule 45 claim by expressly agreeing to a trial date outside the 120-day speedy trial limit and by filing motions and requesting continuances that tolled the speedy trial time. The judge also concluded that Merriner's Fifth Amendment privilege against self-incrimination was not violated because the sealing regulation required Merriner to provide only non-testimonial evidence (the horns of the Dall sheep) and because compliance with the regulation did not pose a substantial risk of self-incrimination in his particular case.

Merriner was subsequently convicted at his nonjury trial. He now appeals.

Why we conclude that Merriner's speedy trial claim is without merit

As a general matter, Alaska Criminal Rule 45 requires the State to bring a defendant charged with a criminal offense to trial within 120 days.[6] For most criminal offenses, this time is calculated "from the date the charging document is served upon the defendant."[7] But the starting date is different for minor offenses.[8] Alaska Criminal Rule 45(c)(6) provides:

> In cases involving minor offenses as defined in Minor Offense Rule 2, the defendant must be tried within 120 days *from the date the defendant's request for trial is received by the court or the municipality, whichever occurs first.*

This provision was adopted by the Alaska Supreme Court in 2001, in response to problems created by defendants charged with minor offenses who often delayed making a decision about whether to go to trial on an offense for which they faced no jail time and a maximum fine of $500.[9] (In the current case, for example, Merriner did not request trial on the minor offense until the date of his arraignment, which was approximately three months after the original citation.)

Merriner does not dispute that if his speedy trial time is calculated from the date he requested trial, as required under Rule 45(c)(6), then his speedy trial rights were not violated. Instead, he claims that Rule 45(c)(1), the provision for misdemeanors and felonies, should govern his speedy trial calculation because the original citation was ambiguous as to whether he was being charged with a misdemeanor or a minor offense.

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[6] Alaska R. Crim. P. 45(b).

[7] Alaska R. Crim. P. 45(c)(1).

[8] Alaska R. Crim. P. 45(c)(6); *see also* Alaska R. Minor Offense P. 15 ("The right to speedy trial on minor offenses is governed by Criminal Rule 45. A defendant charged with a minor offense must be tried within 120 days from the date the defendant's request for trial is received by the court or the municipality, whichever occurs first.").

[9] *See Alvarez v. Ketchikan Gateway Borough*, 91 P.3d 289, 293-94 (Alaska App. 2004).

In other words, he claims that his speedy trial calculation should run from the date he received the original citation rather than the date that he requested trial.

We find no merit to this claim. As we have already explained, Merriner and the State both expressly agreed that the misdemeanor designation was a mistake, and that Merriner was only being charged with a minor offense. At arraignment, Merriner was arraigned only on the minor offense, and his request for trial was a request for trial on the minor offense. In addition, Merriner's attorney also took great care to ensure that the case caption was changed to a minor offense case caption and that the court system's computerized public records identified the original charge as a minor offense.

Given this record, we conclude that Rule 45(c)(6), the speedy trial rule for minor offenses, governed the speedy trial calculation in Merriner's case and we therefore reject Merriner's speedy trial claim on appeal.

Why we conclude that Merriner's compliance with a facially neutral fish and game regulatory requirement did not violate his constitutional privilege against self-incrimination

Merriner argues that the fish and game regulation requiring him to provide his sheep's horns for sealing violated his Fifth Amendment privilege against self-incrimination because it required him to provide the State with evidence that could be used against him in a future criminal proceeding.

In response to this claim in the trial court, the State provided affidavits and other evidentiary support showing that the challenged regulation serves a non-criminal purpose — namely, it ensures that the Department of Fish and Game receives accurate information about the age and health of all harvested sheep and the sealing requirement is therefore indispensable to the Department's ability to maintain a sustainable Dall sheep population in Alaska.

The State also pointed out that the sealing requirement required only non-testimonial evidence and was itself facially neutral — that is, it applies to every Dall sheep ram that is harvested, not just those suspected of being sub-legal.

Merriner did not challenge the State's proffer in the trial court; nor does he otherwise dispute that the regulation is facially neutral or that it serves a legitimate game management purpose. Instead, his argument is essentially that the regulation violated his Fifth Amendment rights because Merriner's compliance with the sealing requirement led to the discovery that the sheep was sub-legal, thereby providing the State with evidence that was then used in this minor offense prosecution.

But federal law is well-settled: facially neutral reporting requirements that serve legitimate regulatory and non-criminal purposes do not, standing alone, infringe on the protections against self-incrimination provided by the Fifth Amendment.[10] We find no merit to Merriner's self-incrimination constitutional claim.

Merriner's other constitutional arguments

It is unclear whether Merriner is arguing any other constitutional claims in his appeal. In his original motion to dismiss, Merriner referred to violations of his due process rights and his privacy rights, but he never developed these claims as arguments independent of his self-incrimination claim, and the trial judge did not rule on them. Accordingly, these claims have been waived for purposes of this appeal.[11]

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[10] *See California v. Byers*, 402 U.S. 424, 430-32 (1971); *see also State, Dep't of Revenue v. Oliver*, 636 P.2d 1156 (Alaska 1981); *Collier v. Anchorage*, 138 P.3d 719, 721 (Alaska App. 2006); *Olsen v. State*, 1991 WL 11259319, at *7 (Alaska App. Sept. 26, 1991) (unpublished); *Creary v. State*, 663 P.2d 226, 229 (Alaska App. 1983).

[11] *See Hollstein v. State*, 175 P.3d 1288, 1290 (Alaska App. 2008).

Conclusion

The judgment of the district court is AFFIRMED.